In the Supreme Court of the United States

October Term, 1969

No. 119

Brief for Respondent in Opposition to Petition for a Writ of Certiorari

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 119

RICHARD S. SIMPSON,
Petitioner,
vs.
UNION OIL COMPANY OF CALIFORNIA,
Respondent.

Brief for Respondent in Opposition to Petition for a Writ of Certiorari

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported (——F.2d——) but is in 1969 Trade Cas. ¶ 72,787. A copy is appended to the petition as Appendix A. The District Court wrote nothing formally designated as an opinion, but its Findings of Fact and Conclusions of Law are reported at 270 F.Supp. 311, and a copy is appended to the petition as Appendix B. On a prior appeal this Court rendered an opinion at 377 U.S. 13 (1964).

JURISDICTION

The judgment of the Court of Appeals was entered April 30, 1969, and a petition for rehearing was denied June 12, 1969 (1 Cir.).* The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Petitioner (plaintiff) predicated his case on Section 1 of the Sherman Act (15 U.S.C. § 1) and Section 4 of the Clayton Act (15 U.S.C. § 15), which are quoted in Appendix C to the petition.

QUESTIONS PRESENTED

Petitioner's eight questions (Pet. 3-6) involve two subjects. The questions are more correctly stated thus:

1. (a) Did not the last sentence of the Court's opinion in *Simpson v. Union Oil Company of California*, 377 U.S. 13, hold that the new rule concerning consignment announced in that decision was not to be further applied in that case if the facts thereafter made known by a trial showed that it would be inequitable to do so?

(b) The trial having thereafter occurred, the trial court found the facts and the Court of Appeals sustained the findings as fully supported by the evidence. Is there anything warranting review of the facts by this Court under the "two court rule"?

2. Petitioner predicated his claim of damages on non-renewal of a service station lease from respondent. He lost no earnings by the non-renewal because he earned more at another service station to which he immediately moved. The business conducted by him at respondent's station had no value because it produced no more than enough to pay wages for his labor. The trial court, holding that a verdict of $100,000 was shocking and monstrously

*To avoid confusion, we designate the record by the symbols used in the petition. Tr. refers to reporter's transcript; C. to the Clerk's transcript, which is in 3 volumes, I being the proceedings in the Court of Appeals (not paginated), 2 and 3 the District Court Clerk's record.

excessive, granted a new trial, if one should be necessary. Does anything in this exercise of a trial court's elementary power to grant a new trial for excessiveness of the verdict warrant review by this Court?

STATEMENT OF THE CASE

Petitioner is hereafter referred to as "Simpson", respondent as "Union".

On a prior appeal in this case, *Simpson v. Union Oil Company of California*, 377 U.S. 13 (April 20, 1964), the Court announced a new rule under the Sherman Act concerning consignment, overruling *United States v. General Electric Co.*, 272 U.S. 476. The Court's opinion then concluded with this sentence (377 U.S. at 24, 25):

> "We reserve the question whether, when all the facts are known, there may be any equities that would warrant only prospective application in damage suits of the rule governing price fixing by the 'consignment' device which we announce today."

After the case returned to the District Court, Union moved for a pre-trial conference (3 Cr. 587, 589),

> "to determine the mode and order of trial of the issue reserved by the Supreme Court of the United States, viz: Whether the equities do not preclude retrospective application of the rule announced by that Court to this case."

Simpson objected that this Court's opinion had left no such equity issue open (3 Cr. 16-17, 3 R. 11), but, in any event, that the equity issue should be tried by court, not jury. By pre-trial order the District Court ordered (2 Cr. 125 ¶24):

> "2. Included in the issues to be tried is the issue whether the equities warrant only prospective application of the rule announced by the Supreme Court in this case governing price fixing by the consignment device, specifically, in this case, where the facts occurred before the Supreme Court an-

nounced its rule, whether the equities preclude application of that rule. In that connection, upon the trial of the case, defendant shall be afforded an opportunity to present to the Court and to the jury evidence supportive of its claim that the equities do not warrant application in this case of the rule respecting consignment agreements announced by the Supreme Court."

Simpson thereupon filed in this Court a "Motion for Leave to File Petition and Petition for Writ of Prohibition or Mandamus or Both in the Alternative" (Supreme Court Misc. No. 555, October Term, 1966). He contended that the pre-trial order violated the Court's mandate, claiming that the mandate did not permit Union to assert any equities precluding retroactive application to this case of the rule announced by this Court.* The motion was denied, *Simpson v. United States District Court*, 385 U.S. 806 (1966).

Thereafter the case was tried. The evidence explored in detail what Union's consignment system was and how and why it came to be adopted. Union's General Counsel testified that he had been consulted by management, had studied and researched the law, reviewing *United States v. General Electric Co.*, 272 U.S. 476 and cases both before and after, and had advised that there was no legal objection to the proposed consignment system, either antitrust or otherwise, and that Union's consignment arrangement was copied from General Electric's (summarized in the opinion of the court below, App. to Pet. p. xxvii).

Simpson urged at the last pre-trial hearing before trial (Tr. 14a-17) and urged again during the trial (Tr. 124, 130) that the equity issue was not to be decided by the jury but by the judge.

*He further argued that, in any event, the equity issue was not to be tried by a jury. Union replied that it was indifferent whether the issue was to be decided by court or jury and that the pre-trial order merely specified that there was to be a single trial with all the evidence coming in before court and jury but leaving open to the trial judge the question whether the equity issue would be put to the jury or decided by the court.

Acquiescing in Simpson's view, the trial court reserved the equity issue for its own decision (Tr. 1632-3) and gave the case to the jury to determine what damages, if any, Simpson had sustained if Union had violated the law (2 Cr. 297).

After the verdict the District Court decided the equity issue (Tr. 1801-1803) and made extensive Findings and Conclusions of Law on that issue (3 Cr. 540-47).* It found that Union had modeled its consignment arrangement on General Electric's, that the two were substantially the same, that Union's was a true and *bona fide* consignment and not a subterfuge, that prior to this Court's decision on April 20, 1961 Union believed in good faith that the consignment agreements between itself and its retail gasoline dealers and the actions taken by it pursuant thereto were entirely lawful under the antitrust laws, that it relied in good faith on *United States v. General Electric Co.*, 272 U.S. 476, and that its belief and reliance were reasonable and warranted by *United States v. General Electric*, 272 U.S. 476 and other authorities. It found (Finding 14):

> On all the facts as they now have been made known by the trial of this case it would be unfair and unequitable to apply to this damage action, wherein the operative facts all arose in the years 1956-1958, the rule respecting price fixing by the consignment device announced on April 20, 1961 in *Simpson v. Union Oil Company of California*, 377 U.S. 13

It concluded:

> 8. The equities warrant only prospective application to damage suits of the rule respecting price fixing by the consignment device announced on April 20, 1961 in *Simpson v. Union Oil Company of California*, 377 U.S. 13, and particularly do not warrant application of said rule to this case.

* These Findings and Conclusions are set forth in Appendix I to the Petition.

theretofore had no existence; it was a "rule . . . which we announce today". It was, of course, to govern business thereafter, as a basis for injunctions, cease and desist orders, and criminal actions and damage suits arising out of facts which should occur after April 20, 1964. But whether it should be applied to a damage suit arising out of facts that had occurred before the rule was announced was another matter entirely. Plainly, by that sentence the Court established the "law of the case" for cases involving its consignment rule, as being that the principle of non-retroactivity was applicable if the facts warranted. The Court did not detail what were the proper circumstances that would trigger the principle of non-retroactivity into operation. But what they were was evident then and has since then articulated in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), in what the court below calls the "five-way test" (Pet. App. xvii): (1) Was there a clearly defined judicial doctrine, (2) upon which the defendant relied, (3) under which its conduct was lawful, (4) which was overruled in favor of a new rule, (5) according to which conduct performed in reliance upon the old rule would have been unlawful.

The first, third, fourth and fifth of the elements of this "five-way test" are matters of law. The second, reliance, is a question of fact, which could only be ascertained by a trial whereby "all the facts [are made] known". Patently, this Court's mandate to the lower courts was to determine the fact of reliance and any other facts that might be claimed to be controlling or relevant to the equity in question and which were not before the Court when it decided the case in April 1964. Patently the Court recognized that the rule it announced about consignment was a new rule and that it overruled a former rule under which Union's conduct was lawful. Patently the Court held that if the facts—when made known by a trial—showed Union's consignment arrangement to have been a true consignment and not a subterfuge and entered

upon in reliance of the then law, the new rule was not to be further applied to the facts of the case which arose before the new rule was announced.

We say that this is obvious, for otherwise the last sentence of the opinion would have no meaning whatever, and its sole consequence would have been to mislead the courts below and the parties into the futility of a trial to determine facts to no purpose whatever. Every court, every judge, every commentator who has had occasion to look at that sentence has agreed on what it held. Thus the Chief Judge of the District Court for the Northern District of California, who entered the pre-trial order which this Court refused to disturb (*Simpson v. United States District Court*, 385 U.S. 806), remarked, "If the English language means anything to me at all, the Honorable Justice meant precisely what you [Union's counsel] say" (Tr. 11). Recently a judge of the District Court for the Central District of California, referring to the concluding sentence of this Court's opinion in *Simpson*, said to petitioner's counsel, "If the Supreme Court had accepted your view, that last paragraph is just nonsense."* And the opinion of the Court below observes (Pet. App. xvi):

> "We find it is clear that the Supreme Court announced a new rule in *Simpson*. The court's language concerning '. . . the rule governing price fixing by the "consignment" device which we announce today', leaves no doubt."

So clear is the matter that on petition for rehearing by the Court of Appeals *en banc*, the matter was presented to every judge of the court, and none voted for a rehearing (Pet. App. B). The Fifth Circuit, in *Guidry v. Continental Oil Co.*, 350 F.2d 342 (1965), referring to the last sentence of this Court's opinion in *Simpson*, said (p. 344):

> "However, the Court in Simpson reserved 'the question whether, when all the facts are known, there may be any

*Transcript, August 1, 1969, p. 468, Case No. 66-1166-R.

> equities that would warrant only prospective application in damages suits of the rule governing price fixing by the "consignment" device which we announce today.' This reservation seemingly refers to the inequity to subjecting the Union Oil Company to a triple damage action for conduct that was apparently legal until the narrowing of United States v. General Elec. Co., 1926; 272 U.S. 476, 47 S.C. 192, 71 L.Ed. 362."

Similar observations can be found in the numerous decisions and legal commentary cited in footnote 8 of the opinion of the court below (Pet. App. xvi, xvii).*

The short of the matter is this:

1. The decision below holds nothing in conflict with any decision of this or any other court. It merely carries out this Court's mandate by applying the legal principle which this Court laid down for governance of the courts below *in and for this very case,* in its decision of April 20, 1964. To what extent that principle may be applicable to another situation involving some other rule of law is a question not now involved or presented. Basically, petitioner is asking the Court to change *part* of what it held in *Simpson v. Union Oil Company of California,* 377 U.S. 13. There the Court announced a new rule of substantive law but with a qualification as to retroactive application. Petitioner wishes to delete the qualification. That is no more appropriate than it would be for respondent to ask the Court to revoke the new rule itself. What this Court held—and the whole of what it held—is the law of this case and binding on petitioner as well as respondent.

**Atlantic Refining Co. v. Federal Trade Commission,* 344 F.2d 599 (6 Cir., 1965), cited in the petition, itself states: "The opinion by Mr. Justice Douglas, joined by four other members of the Court, limited the protection of such [consignment] agreements (which Union Oil Co. and our present appellant had found in *United States v. General Electric Co.,* 272 U.S. 476 * * *) to situations where the protected consignment agreements pertained to products on which the consignor held patent rights [p. 600] * * * the relief contemplated by this order [of the F.T.C.] consists of cease and desist orders which can be applied only prospectively * * *" (p. 607).

2. What is left is the mere question of *fact*, the facts which this Court held had to become "known" in order to determine whether it was equitable to change the rules of the game after the game had been played. *That* question of fact has been decided by the District Court, and its findings have been affirmed by the Court below. Under the "two-court rule" such a question of fact is not one for certiorari review. *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949); *Berenyi v. Immigration Director*, 385 U.S. 630, 635 (1967).

Little need be said in response to further arguments of the petition. In good part it pecks in the record for grains of evidence, then often incorrectly stated, in an effort to contradict the findings; it is a sufficient reply that the law assigns to the trial court the function of finding facts, passing on credibility, and weighing the whole body of the evidence. In good part the petition simply hands back to this Court fragments of the reasoning upon which the Court reached the new rule it announced in April 1964, which has nothing to do with whether the new rule should be retroactively applied.

On the question of retroactivity the petition does little more than argue, from the premise that under Article III of the Constitution courts may resolve issues solely in concrete cases or controversies, that a new rule announced in any case must be applied to that case. But we need not involve ourselves in any argument about the relevance of Article III to the question of giving new rules only prospective application. We need not, because the new rule of April 20, 1964 *was* given *an immediate effect* in the very case in which this Court announced it. It was on the basis of the new rule that this Court reversed a summary judgment of dismissal of the action and remanded it for further proceedings and trial. Thus its pronouncement could not conceivably be called "dictum"; it was uttered in a "case and controversy" with immediate effect. Plainly, Article III says nothing about *how much* effect a court

must give a new rule; that is a function of the exercise of judicial power in disposing of the "case or controversy".

Petitioner claims that "parties who bring about an innovative principle of law are entitled to the benefits of the rule announced" (Pet. 45). Obviously, if the party on whose suit a new rule is declared *must* have the benefit of it in every possible way, this Court could not have reserved the question whether the new rule should be prospective until all the facts were made known. Petitioner's contention simply contradicts what the Court said in the concluding sentence of the *Simpson* opinion.

II. Relative to Damage Questions

Petitioner's 7th and 8th purported questions relate to questions of damages, but the opinion below contains nothing novel on the subject.

It is hornbook law that a motion for new trial, unlike a motion for judgment n.o.v., is addressed to the sound discretion of the trial court and will not be overturned excepted for abuse of discretion. The trial court may grant a new trial if it believes the verdict to be contrary to the weight of the evidence or the damages excessive. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 249, 251; 6A Moore's Federal Practice (2d ed.) ¶ 59.08[5], pp. 3816, 3817. The discretion is vested in the trial judge, for it is he "who saw and heard the witnesses and has the feel of the case" and can "view the proceedings in a perspective peculiarly available to him alone." *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216 (1947).

No novel principles of damages were summoned by the court below to sustain the trial court's discretion in concluding that the verdict was excessive. Contrary to the petition, the court below did not limit the recoverable damages to the theory of loss of fair market value of a business or deny Simpson the right to measure damages by lost profits. Because he earned more at a Mobil station

after he left Union's premises and did so as long as he chose to be a service station operator, Simpson essentially abandoned, in the court below, the claim that he had lost future profits. The court's opinion discusses measurement of the value of a business because *that* was the damage theory which Simpson presented to it in his brief (Pet. App. xxii). The opinion below shows that there was little, if any, value to the "business" at the Union station, because Simpson had earned no more than wages for his labor. Consequently, petitioner now reverses his field and shifts back to the theory of lost earnings. But there were none.

The court below held no more on the damage issues than that, no matter how damages were measured, the District Court was well within its discretionary power in holding the verdict of $160,000 to be monstrously excessive.

CONCLUSION

It is respectfully submitted that the petition should be denied.

Dated: San Francisco, California, August 26, 1969

Moses Lasky

Attorney for Respondent